

REDACTED

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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10166-MLW-ALL

4
5 THE UNITED STATES OF AMERICA

6
7 vs.

8 SALVATORE F. DIMASI, ET AL

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11 *****

12
13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15 Pretrial Conference

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Wednesday, June 17, 2009

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
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COPY

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1 P R O C E E D I N G S

2 (Begins, 11:00 a.m.)

3 THE CLERK: United States versus Salvatore
4 DiMasi, et al., Criminal Number 09-10166. The Court is
5 in session. Please be seated.

6 THE COURT: Good morning. Would counsel
7 please identify themselves for the Court and for the
8 record.

9 MR. MERRITT: Good morning, your Honor.
10 Theodore Merritt on behalf of the government.

11 MR. FULLER: Anthony Fuller on behalf of the
12 government, as well, your Honor.

13 MR. GOLDSTEIN: Good morning, your Honor.
14 Robert Goldstein on behalf of Joseph Lally, who is
15 present in court.

16 MR. WEINBERG: Good morning, your Honor.
17 Martin Weinberg for Richard Vitale, who is sitting to my
18 right.

19 MR. KILEY: Good morning, your Honor. Thomas
20 R. Kiley. Mr. DiMasi, to my left. And Mr. Cintolo is
21 with us both.

22 MR. DRECHSLER: Good morning, your Honor. Tom
23 Drechsler for Mr. McDonough, who is here in court.

24 THE COURT: Okay.

25 As you know, this case was randomly assigned to

1 me. Magistrate Judge Collings is, at least for the time
2 being, handling the early phases, including discovery.
3 However, there are several issues that I wanted to
4 discuss at the outset with counsel and the parties.

5 I think before discussing what the case is about,
6 it's prudent and appropriate to tell you certain things
7 and give you a chance to ask me any questions, express
8 any concerns you might immediately have. I'll give the
9 parties an opportunity to respond after today. However,
10 I think, these are matters that counsel should discuss
11 with their clients.

12 I feel comfortable that I'm not biased or
13 prejudiced in any way and my recusal, based on the
14 individual matters I'll describe to you, that those
15 matters, cumulatively, in my present view, certainly
16 wouldn't require my recusal under Section 455(b)(1) of
17 Title 28, nor, at the moment, do I believe that a
18 reasonable person would question my impartiality based
19 on the matters I'll describe to you. So -- if I had
20 come to that conclusion, I would disqualify myself under
21 Section 455(a). But I do want to consider any questions
22 or concerns that you may have today, but particularly
23 after today.

24 There are three things that I want to describe and
25 then ask you, within reason, whether you'd like to ask

1 me anything else.

2 First, I believe I've met Mr. DiMasi once. We sat
3 together at a Boston Bar Association luncheon in
4 connection with its annual meeting several years ago.
5 It's possible we've encountered each other at some other
6 time, but that's the one time I remember meeting
7 Mr. DiMasi. We were seated at a table of about 10
8 people. We were not seated next to each other, as I
9 recall.

10 But would anybody like to ask me any questions
11 about that?

12 MR. KILEY: Did he behave himself, your
13 Honor?

14 THE COURT: I don't remember anything
15 memorable.

16 Okay. Second, the Deputy Clerk assigned to me is
17 Dennis O'Leary. Mr. O'Leary is married to another
18 employee of the court, Eugenia O'Leary. Mr. O'Leary
19 advised me that his wife, Eugenia's aunt, told Eugenia
20 that she worked for one of the defendants. And we're
21 going to have a closed session where I'm going to give
22 you, in the greater detail, the names -- or the name.
23 But as this is a matter that occurred before the grand
24 jury, at least until I consult the government, I don't
25 want to discuss it on the public record. Well, let me

1 take a step back.

2 Dennis O'Leary told me that his wife's aunt told
3 his wife that she worked for one of the defendants
4 identified and that she had been called to testify
5 before the grand jury. Because grand jury matters are
6 secret, unless it's necessary to make them public in
7 connection with a court proceeding, generally, as I
8 said, and I'm not saying the name right now, but we'll
9 go back in the lobby and I'll tell you later and they'll
10 be a transcript and perhaps it will be made part of the
11 public record.

12 In any event, Mr. O'Leary told me that he and his
13 wife, Eugenia, have not discussed his wife's aunt's
14 grand jury testimony or the case with the aunt. They
15 were just told that she testified. And Mr. O'Leary
16 thinks that the prosecutors may have been told about
17 this connection.

18 Mr. O'Leary is not here today. If necessary or
19 appropriate, I could exclude him from all participation
20 in the case. It would be somewhat disruptive, but not
21 impossible to deal with. However, I thought I should
22 promptly bring that to your attention.

23 Are there questions you'd like to ask me about
24 that? Is this something that -- does the government
25 know what I'm talking about?

1 MR. FULLER: I believe so, your Honor.

2 THE COURT: Okay. All right. Well, I will,
3 as I said, give you the name of the aunt and the
4 defendant for whom she worked, when we go back, and
5 perhaps it will soon be made part of the public record.
6 But I want to hear from counsel on that.

7 And then the third and last thing that I thought I
8 should tell you is the following. Since 1986, I've been
9 the chair of a program called the John William Ward
10 Public Service Fellowship for Boston Latin School
11 students. It is a program that gets summer jobs with
12 public officials in the Commonwealth to encourage them
13 to become engaged citizens and public leaders. They
14 work for the Governor, the Mayor, some of them work in
15 the State Legislature, although none work for Speaker
16 DiMasi. As I recall, the Ward Fellows worked in the
17 Attorney General Bellotti's office in the early years of
18 the program when Mr. Kiley was the First Assistant.

19 As a judge I cannot be involved in any fundraising
20 and I'm not involved in any fundraising for this
21 program. It doesn't need or have much money. But the
22 limited fundraising that is done is done by now the
23 former fellows and other leaders of the program. Every
24 year, and sometimes periodically, I see financial
25 statements and they show who made contributions to the

1 program. And one of the former fellows, who is now a
2 young lawyer and a leader of the program, whose name I
3 can tell you, if you think it's important, but if the
4 name is not important, I won't mention it, has a mother
5 who is employed by the Vitale Catarino accounting firm.
6 The accounting firm has a foundation. And I don't think
7 this is anything that the government knows anything
8 about. I'm looking at Mr. Fuller looking at
9 Mr. Merritt.

10 In 2006 and 2007, this young man's mother applied
11 to the foundation, which apparently considers
12 applications or requests from employees of the firm, for
13 a contribution to the Boston Latin School Association
14 for the Ward Fellows Program. \$500 contributions were
15 made by the foundation in 2006 and 2007.

16 I would have seen that. I don't have any memory
17 of having seen it, but the name of the firm wouldn't
18 have meant anything or the name of the foundation
19 wouldn't have meant anything to me at that time.

20 On about December 21st of last year, 2008, there
21 was a reunion of the Ward Fellows and this young lawyer
22 asked me if his mother should not ask the foundation for
23 a contribution again, for 2008, because Mr. Vitale's
24 name had been in the newspaper as being under
25 investigation, a Federal investigation, I think, and I

1 didn't tell him that she couldn't ask again, for several
2 reasons.

3 One is that I know the young man's mother and I
4 know that she takes pride in being able to generate
5 support for a program that meant a lot to her son. I
6 was told that the foundation was separate from the firm
7 and I understood from the young lawyer and/or from the
8 media -- and I checked again, that it was in the May
9 17th, 2008 Boston Globe, and that Mr. Vitale was retired
10 from his firm. The money wasn't being given to me,
11 certainly. Mr. Vitale was only reportedly under
12 investigation. There was no Federal charge or case.
13 And I didn't know the case would get assigned to me, if
14 there was a case.

15 So as far as I knew, Mr. Vitale didn't have any
16 role in the foundation, at the end of that party, in a
17 conversation that probably took a minute or two, at the
18 most, and I said that it would be okay if his mother
19 wanted -- well, I wasn't telling him not to do it. I'm
20 not generally involved in these things and I didn't seek
21 to veto it.

22 I've checked the records. On December 23rd, 2008,
23 a \$500 contribution was made by the Vitale Catarino
24 Foundation through the Boston Latin School Association
25 for the Ward Fellows Program. As I said, I can give you

1 the name of the young lawyer and his mother, if you'd
2 like.

3 But would anybody like to ask me any questions
4 about that?

5 MR. FULLER: No, your Honor.

6 THE COURT: Is there anything else, within
7 reason, you'd like to ask me about that might relate to
8 the propriety of my participation?

9 (Silence.)

10 THE COURT: All right. And does anybody have
11 any immediate concerns? You shouldn't be timid about
12 expressing them.

13 (Silence.)

14 THE COURT: I'll issue a written order on
15 this. But I am directing that defendants' counsel speak
16 to the defendants, discuss all of this, see whether they
17 have any concerns or objections. But essentially the
18 relevant questions are whether you think a reasonable
19 person could question my impartiality if that person
20 knew what I've described? And if a reasonable person,
21 in the circumstances, would question my impartiality, if
22 I shouldn't participate in the case? And that's a
23 ground for recusal that could be waived under Section
24 455(e) so the order will ask whether, in any event, you
25 waive any argument or objection under Section 455(a).

1 And the government will have to consider this and tell
2 me its position, too.

3 I can't completely delegate the decision regarding
4 refusal to the parties. I have a duty to protect
5 against forum shopping, as the First Circuit discussed
6 in *In re Allied Signal*, 891 F. 2nd 967 at 970, and as I
7 later discussed in *Salemme*, 164 F. Supp. 2nd 86.
8 However, I will consider the parties' views very
9 seriously, as I did in the *Sawyer* case in about 1994.
10 There's a September 2, 1994 order in *Sawyer*. And I
11 certainly am not going to take offense or be affected as
12 we go ahead, if anybody raises a question, expresses a
13 concern, or makes an objection that doesn't ultimately
14 prove to be persuasive. However, as I said, I think
15 it's very important to deal with these matters at the
16 beginning of any case and hopefully put them to rest.

17 Would it be reasonable for me essentially to ask
18 you to make filings on this issue, say, by Friday?

19 MR. KILEY: Yes.

20 MR. FULLER: That's fine, your Honor.

21 THE COURT: Okay. And does anybody have any
22 concern or objection to my proceeding today?

23 MR. WEINBERG: No, your Honor.

24 MR. KILEY: No.

25 MR. DRECHSLER: Can I ask one procedural

1 question, Judge? If we have no position, there's no
2 objection or anything, must we file something?

3 THE COURT: Yes.

4 MR. DRECHSLER: Okay.

5 THE COURT: You're going to tell me -- it's
6 going to be in writing. You're going to tell me that
7 either you have an objection and explain it or you're
8 going to tell me that there is no objection and you're
9 going to tell me whether you also -- your clients waive
10 any Section 455(a) ground for recusal as is permitted
11 under Section 455(e). Okay?

12 MR. DRECHSLER: Thank you, your Honor.

13 THE COURT: All right.

14 I've read the indictment in the case and certain
15 other filings, but it's always my practice, when I see
16 counsel and the parties in a criminal case for the first
17 time, to ask for an overview and essentially what you
18 think I ought to know to have a fuller flavor of it as
19 we begin to proceed. So I'll hear from the government
20 and then if there's anything the defendants would like
21 to tell me, I'm interested in that, too.

22 MR. MERRITT: Well, your Honor, I think -- as
23 the Court has read the indictment, it pretty much lays
24 out a fairly good and factual detail of what the
25 allegations are. Obviously I'm sure there will be some

1 legal filings concerning the honest services theory, but
2 apart from that, the government thinks it's a fairly
3 straightforward case.

4 THE COURT: Famous last words, in my
5 experience.

6 But actually that is helpful. The theory of the
7 case is a conspiracy to deprive the public of the honest
8 services of a public official?

9 MR. MERRITT: Correct, and the scheme itself.

10 THE COURT: Well, a mail fraud, a wire fraud,
11 but the -- well, what are the leading cases on that
12 theory now? I haven't looked at it in about 25 years.

13 MR. MERRITT: Well, most recently in the First
14 Circuit there is the *Potter* case, *United States vs.*
15 *Potter*. That was cited. And *United States vs.*
16 *Urciuoli*, if I'm pronouncing that correctly. And, of
17 course, the leading cases still go back to *Sawyer* and
18 *Woodward*.

19 THE COURT: Okay.

20 (Pause.)

21 THE COURT: And this will evolve. But do you
22 have a sense of about how long you think it would take
23 the government to put its case in?

24 MR. MERRITT: I would suggest about three
25 weeks, your Honor.

1 THE COURT: I know that Magistrate Judge
2 Collings has talked to you about discovery. We'll get
3 to that shortly. But -- well, all right.

4 Anything else you think I ought to know or have in
5 mind?

6 MR. MERRITT: I don't think so, your Honor.

7 MR. WEINBERG: Your Honor, we think, in
8 contrast to the government, that this is an unorthodox
9 and even extraordinary expansion of a statute that is at
10 the core of the Supreme Court's scrutiny. Within the
11 past half a year, Justice Scalia, in dissenting from a
12 denial of certiorari of a case named *U.S. vs. Sorich*,
13 S-O-R-I-C-H, expressed extreme concern about the lack of
14 boundaries in 1346, which was Congress's 1988, I
15 believe, response to the Supreme Court decision in
16 *McNally* that talked about the absence of any contours or
17 structure in honest services jurisprudence. Justice
18 Scalia identified a split in circuits and a search for
19 boundaries and, in fact, cited to the *Urciuoli* case,
20 which is U-R-C-I-U-O-L-I, a First Circuit decision by
21 then Chief Judge Boudin.

22 THE COURT: Out of Rhode Island?

23 MR. WEINBERG: Out of Rhode Island, your
24 Honor. And it's a case I'm familiar with. I
25 represented Mr. Urciuoli and he's back on *Urciuoli II*,

1 which is again before the Court of Appeals. But then
2 Chief Justice Boudin talked about a need for and a
3 search for a principle narrowing an expansive statute.

4 Justice Scalia talked about 28 words that had
5 generated, in the years since **McNally**, a search for
6 boundaries and the Ninth Circuit, in a case called
7 **Kincaid**, K-I-N-C-A-I-D, articulated four different
8 theories by which different circuits tried to cabin in
9 the boundarilessness of the 28 words of 1346. In the
10 **Black** case, of course, the Supreme Court, you know,
11 focused on a split in circuits --

12 THE COURT: I'm sorry. In which case?

13 MR. WEINBERG: **Black's** case, which was the
14 portion of 1346 that did not relate to honest services,
15 vis -- vis public officials, but instead related to
16 honest services regarding private parties,
17 employer/employee. To compound, the traditional
18 theories are not delineated in this indictment, which
19 are quid pro quo bribery and concealed conflict of
20 interest. Those are the two in addition to the **Sawyer**
21 theory, which added a third theory of some pattern of
22 gratuities that caused a deviation from honest
23 services.

24 You know, we, at least, would contend that this
25 case, and the charges in the indictment, do not provide

1 clear notice, at least to Mr. Vitale, as well as his
2 co-defendants, as to just what the theory of criminality
3 is except that it clearly impacts -- and this is where
4 --

5 THE COURT: You're saying the indictment
6 doesn't provide clear notice?

7 MR. WEINBERG: Exactly, your Honor. Except
8 that we believe that central to the litigation in this
9 case will be whether or not these defendants, all four
10 of them, conformed their conduct to state law? *Sawyer*
11 says you don't need to violate a state law to qualify
12 for Federal prosecution, although two other circuits,
13 the Fifth in *Brumley* and the Third Circuit say you do.

14 But our defenses in this case will go beyond that
15 set of criteria. We will be contending to the Court
16 that it is because the defendants conformed their
17 conduct to carefully architected state legal
18 requirements, that they are entitled to the legal
19 protection of that conformity. And that if it's the
20 honest services of the state citizens that's being
21 allegedly betrayed by the defendants, that if the state
22 citizens elect legislators that enact a law that they
23 conform with, that they should be protected and indeed
24 immunized from Federal prosecution.

25 And to make things even one step, you know, more

1 interesting, *Urcuioli II* will address that exact matter
2 before the Court of Appeals sometime in the late fall.
3 He was -- he requested and was denied a theory of
4 defense instruction about conforming to state law.
5 Judge Lisi denied the instruction. The jury convicted
6 him. Judge Lisi denied him bail pending appeal. The
7 First Circuit just reversed that portion of her
8 decision.

9 And the central issue of *Urcuioli II*, which again
10 has not been briefed, but will be presented to the Court
11 of Appeals in the upcoming months, will be whether or
12 not a theory of defense is viable to a 1346 prosecution
13 based on a Federal prosecution when the defense is "I
14 conformed with state law, so how could I betray the
15 citizens of the state?"

16 So that's a kind of overview of what we think is
17 an expansion of 1346 beyond its traditional theories.
18 Beyond *Sawyer*. And, you know, we believe that the Court
19 will need to address this defense. That Mr. Vitale, for
20 instance, did not register as a lobbyist because he fit
21 within an exemption under the state lobbying laws which
22 presumes you're not required to register if you don't
23 work 50 hours in any reporting period. I know that
24 Mr. Kiley will inform the Court that it is part of
25 Mr. DiMasi's potential defense is his conformity to

1 state law and that this will be a central and common
2 theme that the defense will bring.

3 THE COURT: I mean, this is the kind of
4 preview of coming attractions I was hoping to get. It
5 seems to me, conceptually, at a very abstract level,
6 something might not violate state law, but could violate
7 Federal law. Here it's the mail fraud and the wire
8 fraud statutes.

9 But do the arguments you make go to whether --
10 well, the state of mind requirements of the mail fraud
11 and wire fraud statutes, for example, intent to
12 defraud?

13 MR. WEINBERG: I think they go to two
14 different elements, one is the state of mind and whether
15 or not somebody that believed they were conforming to
16 state law could have the necessary criminal intent to
17 cause deviation of honest services? But I also think it
18 goes to the very essence of criminal scheme. And
19 whether or not 1346 can be expanded so far from its
20 heartland, which is quid pro quo bribery, the *Seigelman*
21 case, an exchange of money for a job, to encompass the
22 kind of conduct that the government is attempting to
23 prosecute in this case?

24 THE COURT: I think you said, at the outset,
25 that you challenge whether the indictment gives fair

1 notice?

2 MR. WEINBERG: Yes, your Honor. It does not
3 charge quid pro quo bribery, it does not charge a
4 *Sawyer*-type pattern of gratuities designed to cause
5 deviation, and it does not charge a concealment of a
6 conflict of interest. And therefore we, at least on
7 behalf of Mr. Vitale, I am without notice,
8 constitutionally-required notice, as to what the 1346
9 theory is. Remember, 1346 is an unusually vague
10 criminal statute.

11 THE COURT: Well, let me just ask you one
12 question. You said the indictment doesn't give you
13 notice.

14 MR. WEINBERG: Yes, your Honor.

15 THE COURT: Do you anticipate complaining that
16 the statute doesn't give you notice?

17 MR. WEINBERG: Yes, your Honor. And the
18 statute as applied in this case provides us with no
19 notice.

20 THE COURT: Well, at some point I'll ask you
21 whether there's any important First Circuit case after
22 *Anselem* on whether a statute gives adequate notice?

23 Okay. Thank you. Mr. Kiley, is there anything I
24 should know from your client's perspective?

25 MR. KILEY: What Mr. Weinberg represented, I

1 think, speaks for all of us. We do think that this case
2 will present a very involved set of circumstances for
3 you to evaluate the way state law and Federal law come
4 together in defining the honest services duty that an
5 individual owes. And we will indeed be arguing to you
6 ultimately that all of the Speaker's -- that all of the
7 Speaker's actions were expressly authorized by law and
8 permitted by law and that there's been no violation of
9 the statute.

10 In terms of the overview that you want, the
11 case law that you want, I think Mr. Weinberg,
12 Mr. Merritt have given it all to you. The one
13 nonprecedential matter that I would suggest to you, when
14 you're looking at the First Circuit cases, the *Urciuoli*
15 line of cases, the cases that come out of Rhode Island,
16 are very enlightening because they -- because the
17 actions of the Court, the District Judge, the Presiding
18 Judge Lisi in Rhode Island, built on the most recent
19 Federal precedents and in the trial of Messrs. Cramer
20 and Ortiz, at the trial court level, following the
21 return of all of the First Circuit precedents up to the
22 *Urciuoli II* matter, the role that state law plays was a
23 central part of the instructions and I think you're
24 going to have to pay attention to that, your Honor.

25 THE COURT: Do you anticipate -- and you're

1 not wedded to your answer on this. But do you
2 anticipate raising these issues on a motion to dismiss
3 the indictment or is it more likely that I'd be dealing
4 with this during trial?

5 MR. KILEY: It's a certainty you'll be dealing
6 with it at trial if you don't dispose of it with motions
7 to dismiss. There may be dispositive motions.

8 THE COURT: All right. I think -- I'm sorry.
9 Go ahead.

10 MR. KILEY: Again, your Honor, Mr. Weinberg
11 laid it out, from the defense perspective, perfectly.

12 THE COURT: Well, assuming, as I do for
13 present purposes, that I continue in the case, I will be
14 interested, in some fashion, addressing these issues
15 before we get to trial, even if it's only in the context
16 of anticipating what proper jury instructions would be.

17 MR. KILEY: Well, the spirit is really just to
18 inform you what you will be dealing with.

19 THE COURT: Right. And the fact that you told
20 me today communicates that you're not waiting until a
21 jury is impaneled and hoping anybody will be surprised
22 by this. We'll deal with it.

23 All right. Mr. Goldstein? Mr. Drechsler?

24 MR. GOLDSTEIN: There's one issue that may
25 apply only to Mr. Lally, I'm not sure, and it's that

1 Mr. Lally has expressed a strong interest to me, as his
2 lawyer, to secure as speedy a trial as possible in this
3 case. And I don't know what time frame encapsulates "as
4 possible." We're in the very nascent stages in terms of
5 discovery production.

6 THE COURT: I'd say I'm with Mr. Lally and I'd
7 like to see this case proceed with all deliberate
8 speed. We're going to get to talking about discovery in
9 a moment. There does have to be complete discovery and
10 there does have to -- you know, the issues that are
11 raised have to be dealt with. But it would be my goal,
12 you know, to give this high priority to assure that you
13 all have enough time to do what needs to be done
14 thoughtfully and thoroughly and not have it progress in
15 any artificially fast pace, but it would be regarded as
16 a priority matter.

17 MR. GOLDSTEIN: And that's what Mr. Lally is
18 interested in. What I would just add, Judge, is that
19 one of the primary motivating factors behind that
20 request is Mr. Lally has, in essence, become
21 unemployable in his chosen field as a result of the
22 intense coverage the investigation received by the
23 Globe. It's practically impossible for Mr. Lally to
24 secure employment. Every time he gets close to a
25 prospect, the prospect vanishes when likely these

1 companies perform, you know, what is today routine, in
2 terms of Google and other kinds of background searches.
3 And I know the Court has conducted -- had conducted some
4 inquiry regarding the possibility that material had been
5 improperly leaked to various newspaper outlets with
6 regard to the government's investigation, and that
7 certainly didn't help. But even without that, you know,
8 Mr. Lally's ability to continue on this path is somewhat
9 jeopardized the longer that this case progresses. And
10 so on his behalf -- and I know it's an impossible
11 question to answer today, not knowing the scope of
12 discovery, but I did want to put it on the record.

13 THE COURT: That's useful. You know, it
14 elicits my -- my frame of mind. This should be regarded
15 as a priority matter to proceed with -- what the Supreme
16 Court said in *Brown*, is "all deliberate speed." Nothing
17 artificially quickly. Everything needs to be done
18 thoroughly and thoughtfully. But as quickly as
19 reasonably possible.

20 MR. GOLDSTEIN: Thank you, your Honor.

21 THE COURT: Mr. Drechsler.

22 MR. DRECHSLER: I really have nothing to add,
23 Judge, to what's already -- I echo the thoughts of my
24 brother counsel in this regard, other than I -- you
25 know, until I -- like the Court says, until I've seen

1 the discovery, I have no position to take regarding the
2 schedule beyond that.

3 THE COURT: Well, that actually moves into
4 what I had coming up next on my agenda.

5 Again, at the outset, I want to remind all of you
6 of certain obligations that you have. We have Local
7 Rule 83.2(a) which describes the parameters of
8 permissible statements by attorneys in criminal cases.
9 I read the news accounts.

10 The defendants have expressed some concern for
11 pretrial publicity in various ways. I actually --
12 things have changed in the last 25 years. There didn't
13 use to be press conferences at the time of an
14 indictment, there was a little press release, but now
15 there are press conferences. I've read the news
16 reports, some of them the day after the indictment in
17 this case. I didn't perceive anything reported that was
18 inconsistent with Rule 83.2(a) from the government, but
19 I do point you to the rule. You want to keep it in
20 mind. And it imposes obligations on defense lawyers as
21 well as on prosecutors.

22 It's also important, as you know, to be sure that
23 the restrictions relating to grand jury secrecy imposed
24 by Federal Rule of Criminal Procedure 6(e) are observed.

25 The next local Rule, 83.2(b), gives the Court the

1 authority to impose special restrictions in highly
2 publicized cases. That, hopefully, will not prove to be
3 necessary or appropriate in this case. But that
4 authority is there. It's inevitable in a case like this
5 that there's going to be publicity and in other highly
6 publicized cases, in my experience and in the experience
7 of my colleagues, it's been possible to pick a fair
8 jury, but that's always a concern. You know, it's a
9 concern that's already been expressed in various ways in
10 the short time this case has been pending. It's
11 something important for everybody to remain sensitive
12 to.

13 But at this point, is there anything anybody would
14 like to say about this issue?

15 (Silence.)

16 THE COURT: All right.

17 Then, as I do the first time in every criminal
18 case -- the first time I see the parties in any criminal
19 case, I want to point you to the requirements of Rule 16
20 of the Federal Rules of Criminal Procedure and
21 particularly the local rules of the District Court
22 regarding discovery. The local rules provide for
23 automatic discovery of material exculpatory
24 information. That's Rule 116.2. That material
25 exculpatory information has to be obtained from all

1 agencies involved in the investigation of the case.
2 That's Rule 116.8. Notes must be preserved. That's
3 local Rule 116.9. And there's a continuing duty to
4 supplement the disclosure.

5 You know, if information is developed in the
6 course of the case that didn't exist when the earlier
7 disclosure was made, there's a duty to promptly
8 supplement it. The local rules just codify obligations
9 imposed by the Constitution. But despite all kinds of
10 efforts, there have been problems. Nobody wants any
11 problems in this case.

12 So hopefully -- and I asked Magistrate Judge
13 Collings to say this to you when he saw you as well. I
14 can see this is not going to be entirely
15 straightforward, that there's some legal issues, but
16 every effort needs to be made to assure there's no
17 reasonable basis for a complaint that the defendants or
18 the government didn't get what they or it was entitled
19 to, because there are reciprocal obligations imposed on
20 the defendants under Rule 116.1(d) and under Federal
21 Rule of Criminal Procedure 16. So the rules should be
22 helpful to you. Use them as a road map.

23 Now, I see, in the file, that the government filed
24 motions for lis pendens and also for preliminary
25 restraint on certain assets. They were filed June 2nd

1 and 3rd. To my knowledge, no oppositions have yet been
2 filed. They'd be due around now.

3 MR. GOLDSTEIN: Any opposition to the lis
4 pendens were due yesterday. There'll be no opposition
5 from Mr. Lally with regard to that. As relates to the
6 government's proposed order restraining Mr. Lally's
7 ability in terms of his property, which is 4 Oliver
8 Swain Road, you know, we have conducted research
9 regarding the propriety of the Government's order. I
10 think today we'll mail you the filings. And we're
11 reserving our right to later contest the order, if
12 necessary. But there will be no opposition as of today.

13 THE COURT: Okay.

14 MR. KILEY: There is no intention to oppose
15 the lis pendens on the part of Mr. DiMasi.

16 THE COURT: And what about the preliminary --

17 MR. KILEY: There is not.

18 THE COURT: Okay. Mr. Weinberg, are you
19 subject to those motions?

20 MR. WEINBERG: I am not, Judge.

21 MR. DRECHSLER: We are not, Judge.

22 THE COURT: All right. So if I understand
23 this correctly -- and a lis pendens ordinarily just is
24 automatic. It just shows there's a dispute about the
25 title. The restraining order, as I understand it, I can

1 enter it without prejudice to the parties moving for
2 reconsideration. Is that right?

3 MR. GOLDSTEIN: Yes, Judge. There were issues
4 legally regarding the scope of the restraining order
5 requested by the government. I've spoken to Mr. Lally.
6 He can live by the terms presently as they exist and if
7 it comes an issue at a later point in time, I'll notify
8 the Court.

9 THE COURT: All right. So the government
10 would like me to enter the post-indictment restraining
11 order in the form attached, is that correct?

12 MR. MERRITT: Yes, your Honor.

13 THE COURT: Okay. I plan to do that.

14 (Pause.)

15 THE COURT: Now, unless somebody has something
16 else, that completes what I hoped to discuss in this
17 public session. I am planning to see all of you back in
18 the lobby in a session that will, at least temporarily,
19 be closed to the public. I'll give you the name of
20 Mrs. O'Leary's aunt. I'll also discuss with you a
21 matter that is, at present, under seal. It relates in
22 part to an issue that may implicate the attorney-client
23 privilege. Such issues may justify the sealing of
24 documents and the closure of proceedings, as the First
25 Circuit said in *Sidel v. Putnam*, 147 F. 3rd 7 at 9. It

1 also relates, to some degree, with a grand jury matter
2 that possibly should not be made public.

3 As the parties know, I have some questions with
4 regard to whether sealing and closing the proceedings to
5 the public are justified. But it's not only prudent, I
6 find it's necessary to discuss those questions in a
7 closed proceeding. A transcript will be made of that
8 proceeding. That transcript can be unsealed fully or in
9 redacted form if some redactions are appropriate.

10 Therefore, and unless some member of the public
11 wants to be heard on that, we will recess and reconvene
12 in the lobby.

13 Okay. The Court is in recess.

14 (Recess, 11:45 a.m.)
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1 (In the lobby, 11:50 a.m.)

2 THE COURT: All right. Okay. We've
3 reassembled in the lobby. We have everybody except
4 Mr. Cintolo. I don't have either my Docket Clerk or my
5 Deputy Clerk.

6 (Mr. Cintolo enters.)

7 THE COURT: And I've just been handed a June
8 16th, 2009 filing that the government made under seal.
9 I haven't seen it before a few minutes ago. I assume it
10 was filed yesterday?

11 MR. MERRITT: Yes, your Honor.

12 THE COURT: Well, it didn't come to my
13 attention. Once I clarify who is going to be serving as
14 my Deputy Clerk on this, I think, particularly if it's
15 an urgent matter, if it's going to come in the day
16 before the hearing, you should call or at least e-mail
17 to let me know it's on the way.

18 I've just read it quickly. This goes to whether
19 this hearing ought to be sealed --

20 MR. MERRITT: Yes, your Honor.

21 THE COURT: -- and closed to the public and
22 the papers still sealed, which is what the government
23 originally asked for? And I don't suggest, actually,
24 improperly. I think when these kind of issues are
25 raised, it's prudent to probably err on the side of

1 requesting confidentiality and we can discuss the
2 question, which in the process we're engaged in here.

3 I think I'll come back, at the end, to whether the
4 -- I don't know if I can decide whether the proceedings
5 should be open or the transcript should be promptly made
6 available until I know what we're going to be talking
7 about. So let's set some ground rules for proceeding.

8 And I think the government may want to read --
9 reread the redacted version that was given to me. You
10 can't rely exclusively on word processing. You took the
11 attorney's last name out everywhere, but you left his
12 first name in the first time it came up. So go through
13 it again with human eyes. Sometimes the electronics can
14 be challenging.

15 You know, on the other hand, here, you know, we're
16 not talking about wiretap information or information
17 that's not likely to become public at some point, as far
18 as I can tell. So you know I have concerns about
19 closing this.

20 But, here, I told you I would tell you the name of
21 Mrs. O'Leary's aunt. That's redacted . I'm told

22 redacted .

23 So when you -- well, I'll put in my order that you
24 ought to let me know, you know, whether you think I
25 should essentially take Mr. O'Leary off the case.

1 I feel, myself, comfortable that when I tell him
2 "Don't discuss this with your wife and neither of you
3 can discuss it with her aunt," that he would follow that
4 instruction. But, you know, if you think it's necessary
5 or prudent that I just replace him, for the purposes of
6 this case, then I expect I will do that.

7 But now that you know who this is, that it's
8 redacted , is there anything else you would like to ask
9 or tell me?

10 MR. MERRITT: Well, I don't know if the Court
11 knows the answer to this question, but how close a
12 relationship is it between Mr. O'Leary's wife and her
13 aunt?

14 THE COURT: I don't know the answer. In fact,
15 neither of them are here, neither Mr. O'Leary nor
16 Mrs. O'Leary are here this week, but I can talk to them
17 on the telephone. She doesn't work in my session.

18 You know, there will be matters coming in under
19 seal. On the other hand -- well, I'll ask. But maybe
20 you ought to proceed on the assumption, you know, that
21 it's reasonably close. And I haven't talked directly to
22 Mrs. O'Leary about this, so I have hearsay about the
23 original conversation. But I just think it's important
24 that as many as these issues as possible, if they exist,
25 you know, be surfaced, so that they can be considered at

1 the outset and that they be dealt with and that we can
2 proceed.

3 All right. But this doesn't have to be a final
4 answer, as I said, I can give you a couple of days to
5 respond on these.

6 But do you have a concern about Mr. O'Leary
7 continuing at this point?

8 MR. MERRITT: Not at this point, your Honor.

9 THE COURT: All right. All right. Well, you
10 go back and think about it, talk to your colleagues,
11 talk to your clients, and you'll let me know.

12 All right. And then essentially just to preserve
13 their privacy, if it's possible, I didn't tell you the
14 name of the young lawyer or her mother, because they
15 have nothing to do with the case, the young man who is
16 the alumnus of the Ward Fellows program.

17 Does anybody feel you should have that name?

18 MR. MERRITT: No, your Honor.

19 MR. KILEY: I don't even want the name.

20 THE COURT: Okay. Okay. All right. What do
21 you feel is going to need to be done to develop and
22 fully brief this -- well, actually, let me take a step
23 back.

24 (Pause.)

25 THE COURT: All right. What I'm interested

1 in, with regard to this motion to disqualify, is
2 developing a briefing schedule and getting a sense of
3 what's going to be necessary to resolve this.

4 And this is up to Mr. DiMasi, but as his lawyers
5 may have told him, at some point I'm going to ask you,
6 pursuant to the Supreme Court decision in *Wheat*, you
7 know, a set of questions, you know, about if you want
8 Mr. Kiley and Mr. Cintolo to continue to represent you
9 and if you recognize that there are these issues and
10 these risks, which I'll spell out. It may be desirable
11 -- but this is up to you, to get some independent legal
12 advice. In other words, not from Mr. Kiley, not from
13 Mr. Cintolo or from anybody sitting around the table, as
14 to whether you should proceed with them as your lawyers
15 or not.

16 As I said, that's up to you. I'm not ordering
17 it. But I have two concerns that I have in every case.
18 One, I want the proceedings to be fair to everybody and
19 to have everybody energetically and effectively
20 represented, and then, if it turns out there's a
21 conviction, I want it to be final. I don't want to be
22 in the situation where a convicted defendant can come
23 back and have a colorable claim that, you know, "My
24 lawyer was restricted improperly in his ability to
25 represent me because of something."

1 So it will probably be August before we have this
2 hearing, but you've got a right to consult somebody else
3 on these issues, and while they are sealed materials
4 now, I'll put it in my order that you would be permitted
5 to, you know, consult another lawyer and that wouldn't
6 be a violation of my order, unless somebody has a
7 different thought on that.

8 MR. FULLER: No.

9 THE COURT: The government has no objection to
10 that?

11 MR. FULLER: No, your Honor.

12 THE COURT: Okay. So that's up to you.

13 All right. You know, what's going to be necessary
14 to develop the factual record and complete the briefing
15 on the issue -- the issues raised by the motion for
16 disqualification? I saw there was a footnote, maybe in
17 the file that Mr. Weinberg and Mr. Goldstein made,
18 telling me something I anticipated, that you made the
19 request for the full grand jury transcript?

20 MR. KILEY: I did, your Honor. The motion to
21 disqualify was previewed and delivered to us at the time
22 of arraignment, on the 8th, and literally immediately, I
23 think by letter of the 9th, I requested the full
24 transcript and other 3500 material and the government
25 has responded and has provided me -- and I think it's a

1 footnote in their next-to-last submission, which
2 indicated that they provided an additional document,
3 it's an interview report. It is a significant interview
4 report, in my mind, because it indicates that what

5 P.A. told the interviewer, at the time, was that
6 I was not his lawyer. I was not then -- at least then
7 representing him. You don't have that before you, I
8 think, in any additional form. And otherwise declining
9 to provide the balance of the transcript.

10 Obviously I would like the balance of the
11 transcript. But they've made the decision not to do
12 that.

13 THE COURT: Do you intend to ask me to order
14 them to give it to you?

15 MR. KILEY: Well, again, I haven't thought
16 that through.

17 THE COURT: All right.

18 MR. KILEY: There is something I very much
19 intended to do and have refrained from doing because of
20 the impoundment and sealing order, and that's
21 communicating any further with -- that I have not
22 communicated since this issue was raised, with

23 P.A. , P.A.'s current counsel, and
24 P.A.'s former counsel, redacted .

25 THE COURT: Who's his current counsel?

1 MR. KILEY: redacted . And my intention
2 would be to give you a factual record, which I expect
3 would tell you --

4 THE COURT: Right. Well, as soon as I read
5 the motion, I said to my law clerk that they're going to
6 ask for the full grand jury transcript and all the 3500
7 materials that they ordinarily wouldn't be entitled to
8 get this early. I didn't say I was going to give it,
9 but I just said that this is going to be an issue. And
10 I'd have to get a request and I'll have to deal with it,
11 but what do those materials relate to, both whether
12 there was an attorney-client relationship at all and
13 whether there are any statements that might be made at
14 trial that you would be a potential witness on?

15 MR. KILEY: I suppose both. Certainly when I
16 ask for the grand jury transcript, I envision that it is
17 going to contain more material than about his
18 communications with me. But what I do think the record
19 is going to show is that I never represented P.A.
20 in connection with this Federal investigation and that
21 all of my communications with him, with respect to this
22 inquiry, were in the presence of his then counsel. And
23 I think that is going to be the case.

24 THE COURT: The grand jury testimony, the
25 little excerpt I had, seemed to indicate that, at least

1 the first time he met with you, he didn't have another
2 lawyer?

3 MR. KILEY: Correct, and that's what I sought
4 to distinguish, your Honor. The Federal investigation
5 comes toward the tag end of it, after more than a year
6 of other activity, and I think what the grand jury
7 snippet suggests is that he, um, was seeking counsel
8 through Mr. DiMasi first, who directed him to
9 Mr. Egbert, with respect to what his duties were with
10 respect to the Secretary of State's Office, and that, I
11 think, is the matter that is laid out in the snippets as
12 with regard to counsel. And I expect that's what the
13 record would be and my position would be, that I never
14 represented him in this matter and indeed I never opened
15 the file, I never did an engagement letter, you know, I
16 never took a penny from P.A. , and all of that
17 will be in it.

18 THE COURT: That -- and this is just off the
19 top of my head, and you'll address it, but, you know,
20 the government cites cases that are consistent with my
21 understanding, you know, that if somebody consults you
22 even if it doesn't mature into a retained agreement, you
23 know, that that might be a privileged communication.
24 What I couldn't tell from the excerpt attached is when
25 P.A. learned that you were representing

1 Mr. DiMasi. Did he know it from Day 1, as far as you're
2 concerned, or did he learn it later?

3 MR. KILEY: Um, again, more than Day 1. I
4 represented Mr. DiMasi, who was his law colleague, for
5 -- on and off for more than a decade. So from Day 1
6 certainly.

7 THE COURT: Because, analytically, with regard
8 to the government's argument that, you know, Mr. Kiley
9 might be in a position to use confidential information
10 of P.A. on behalf of Mr. DiMasi saying, say,
11 cross-examining P.A. , you know, one of the
12 questions I would have is that if he had no reasonable
13 expectation of confidentiality from Mr. DiMasi, he might
14 have it, you know, with regard to the world generally
15 and what's the impact of that on the analysis? You
16 don't need to answer it. Well, okay. Go ahead. Go
17 ahead.

18 MR. FULLER: Well, I don't know, from the
19 record that we provided, that Mr. DiMasi was present
20 during that first meeting when P.A. met with
21 Mr. Kiley.

22 THE COURT: And I assume he wasn't, but --

23 MR. FULLER: And so I don't understand that he
24 could expect Mr. DiMasi to have any knowledge of what he
25 told Mr. Kiley. So that --

1 THE COURT: Oh, I think this is their joint
2 defense-type point.

3 MR. FULLER: Well, right, your Honor.

4 THE COURT: And this is just questions.
5 You've had a lot more time to think about it. If --
6 let's say Mr. Kiley was representing both of them, but

7 P.A. knew that Mr. Kiley was also representing
8 his traditional client. Then, um, the question I would
9 have is, is information P.A. gave Mr. Kiley
10 confidential information that Mr. Kiley can't use to
11 cross-examine P.A. ? Did he sort of assume that
12 risk that the defendant here, if they ever split, would
13 use that information against him through his lawyer?

14 MR. FULLER: I think certainly it would have
15 to depend on the terms of any common defense. I don't
16 know that there was one here, certainly in writing. But
17 at the end of the day, your Honor, the confidentiality
18 issue is really not what's driving our motion.

19 THE COURT: What is?

20 MR. FULLER: Well, it's certainly the
21 appearance of the conflict that a key government witness
22 sought counsel from the defendant's attorney and was
23 told to tell the truth, which by virtue of that advice,
24 seems to run counter to the interests of that
25 defendant. Because as laid out in the indictment and in

1 our motion, that testimony, if truthful, is inculpatory
2 of the defendant. So that's one thing. Because the
3 advice given was essentially, um, about a key issue in
4 this prosecution, namely this entire relationship
5 between P.A. and Cognos and the payments and
6 Mr. Kiley was privy or heard this witness describe it to
7 him, we believe, in a consistent fashion as to what he
8 will say at trial, again it's in our motion, that
9 Mr. Kiley is a witness to his prior consistent
10 statement. And that really, I think, separates -- to
11 use a term Mr. Weinberg uses, it separates this from the
12 heartland of these other cases. I don't know, of the
13 cases we cite, there's really not a situation where the
14 attorney-client relationship came about in the context
15 of advice on the central issue that was to be tried in
16 the criminal case. It's usually in the context of
17 representing a co-defendant who may have information
18 that may or may not inculcate another defendant and the
19 courts are looking at it respectively not knowing what
20 that witness may say, but there could be a conflict.
21 Here we have a definitive conflict before us that
22 actually makes the attorney a witness.

23 THE COURT: Well, how is he a witness?

24 MR. FULLER: Well, he's a possible witness.

25 THE COURT: Well, that may be. I mean, I'm

1 telling you this just so you can better prepare to
2 address it. There are a couple of things that come to
3 my mind, as you say. To the extent that Mr. Kiley,
4 arguably, shouldn't have been representing both of them,
5 um, under the ethics rules, I don't know how that -- you
6 know, whether that should be a basis for prompt
7 disqualification or just something that should be dealt
8 with if the Board of Bar Overseers is sufficiently
9 interested in it. In other words, you say there's an
10 appearance of --

11 MR. FULLER: Well, I'm not suggesting that he
12 represented him in the sense of -- as Mr. Kiley said, he
13 didn't represent him for the purposes of the Federal
14 investigation, however, he did give advice about the
15 grand jury --

16 THE COURT: Yeah, and I don't think that
17 distinction is dispositive. You know, this was public
18 and, I mean, and we had this at the outset of the *Flemmi*
19 case where I think Mr. Egbert represented Mr. Flemmi and
20 also previously represented one of the bookmakers, as I
21 vaguely recall, Crantz, and the argument was that
22 Mr. Egbert would be able to cross-examine Crantz, on
23 behalf of Flemmi, relying on confidential information he
24 received from Crantz. And that -- do I remember this
25 right?

1 MR. WEINBERG: I think that there was also the
2 parallel component -- there were two parallel components
3 to this case, one being the depth of Mr. Egbert's
4 relationship with -- and the corollary, the depth of
5 Flemmi's need to continue that relationship, which I
6 think parallels the depth of the DiMasi/Kiley
7 relationship, the complexity of this case, and really
8 the irreplaceability of Tom Kiley to Sal DiMasi, as I
9 think it was argued to you, the irreplaceability of
10 Egbert to Flemmi. And second, the fact that the
11 Government regularly elicits from their cooperating
12 witnesses, then Crantz, now P.A. , the very content of
13 the communications between Kiley/P.A. , Egbert/Crantz
14 and so there isn't that traditional risk that secret
15 conversations unknown to the government, known to the
16 lawyer, would give the lawyer an unfair advantage.

17 THE COURT: Yeah, and I haven't had time to do
18 more than read what you filed, but, you know, these are
19 some of the questions and it may influence the scope of
20 the appropriate discovery. But, you know, 1, was there
21 an attorney relationship? My present sense is that that
22 doesn't turn on whether it was with regard to a Federal
23 investigation or not. 2, did P.A. give Mr. Kiley
24 information that he expected would be confidential for
25 Mr. DiMasi or did he understand it would be shared? 3,

1 if he did give Mr. Kiley information that was
2 privileged, with regard to Mr. DiMasi, has that been
3 waived by the testimony of the grand jury? Which I
4 think you may address in this filing I just read. I
5 mean, I think the answer to that is probably "Yes."

6 And so then, um -- so if there was a relationship
7 but it wasn't supposed to be -- the information wasn't
8 supposed to be confidential to Mr. DiMasi and it's been
9 waived anyway, then what's the problem -- well, what's
10 the basis for the disqualification?

11 MR. FULLER: Well, it may not come to pass,
12 but, your Honor, the real issue would then become, in
13 order to vigorously represent Mr. DiMasi, if P.A.
14 is testifying as laid out in the motion, there's going
15 to have to be a cross-examination that's going to attack
16 his credibility to some degree. And if the lawyer doing
17 that witnessed the prior consistent statement and he's
18 the only one who did --

19 THE COURT: Do we know whether Mr. Kiley was
20 the only one who spoke -- you know, who was with

21 P.A. when they spoke?

22 MR. FULLER: Well, I think, based on the
23 record we submitted, that Mr. Kiley was the only one
24 present. If there's a way to have Mr. Kiley stay in the
25 case and not have that happen? But I don't know that

1 there is because he -- I'm sorry?

2 MR. MERRITT: And argue it, too. He has to
3 get up and argue it.

4 MR. FULLER: Yeah. I mean, that's the issue
5 that the Court is aware, the lawyer is the advocate, not
6 someone testifying to a fact. So it becomes --

7 THE COURT: And these are things, you know,
8 that we're going to have to -- if Mr. DiMasi continues
9 to want Mr. Kiley and Mr. Cintolo to represent him,
10 these are things I'm going to have to review with them.
11 But -- and again, it's a right thing to raise at the
12 beginning of the case before going to trial. I don't
13 criticize you're raising it, I sort of commend you
14 surfacing it now, because the argument that it, you
15 know, disrupts an important relationship gets stronger
16 as you get toward trial.

17 But the other question is, you know, how real is
18 this risk that Mr. Kiley is going to be a witness? And
19 this is part of the reason I -- and if what P.A.
20 has told the government is consistent with what he told
21 Mr. Kiley, not a prior inconsistent statement, um, well,
22 or Mr. Kiley doesn't have any prior inconsistent
23 statements that he can testify to, how would he be a
24 witness?

25 MR. FULLER: I'm sorry?

1 THE COURT: Yeah, I mean I think your theory
2 is that if P.A. testifies in a way that's
3 inconsistent with what he told Mr. Kiley, Mr. Kiley is a
4 potential witness.

5 MR. FULLER: What I'm saying is, if he -- in
6 his grand jury snippet that we included, he says, in
7 that sense, "I told Mr. Kiley the same thing that I've
8 told the grand jury," we have essentially included a lot
9 of that in the indictment and it inculcates, obviously,
10 Mr. DiMasi. So if P.A. testifies consistently
11 with that, which we expect he will, I don't understand
12 how to vigorously defend Mr. DiMasi. He will not be
13 attacked -- his credibility won't be attacked on what
14 was said. If that doesn't happen --

15 THE COURT: Well, as I say, he'll attack his
16 credibility and then you would want to call Mr. Kiley as
17 a witness?

18 MR. FULLER: That may be what happens, your
19 Honor.

20 THE COURT: Well, because it was a prior
21 consistent statement? Why was it -- and then I would
22 ask you -- and this isn't an answer, it's a question,
23 but was it before there was a motive to fabricate?

24 MR. FULLER: It was after -- it was before the
25 grand jury subpoena and before he was contacted by the

1 Federal authorities.

2 MR. KILEY: I think the record will be to the
3 opposite effect on that. I think the record will be
4 that the conversation at the time in the Secretary of
5 State's Office is before subpoenas and Federal
6 involvement. But I think the record will be, at the
7 time of the -- the tell-the-truth allegation -- perish
8 the thought that that's truly what I said, but if I
9 undoubtedly did --

10 THE COURT: But before you perish the
11 thought.

12 MR. KILEY: -- I think the record is going to
13 be -- which takes me full circle what I envision doing,
14 is dealing with redacted , who was his lawyer, who was
15 present at the time, it would be part of what I would
16 develop, and at that point in time they were there --
17 when redacted came over, it was at the time of the
18 Federal investigation when, um, the question to tell the
19 truth arose -- represented by another, who was present.
20 I did not have any private communication with

21 P.A. at all, in that time period, and that's what
22 the record, I'm sure, will show, which would properly
23 put me in --

24 MR. FULLER: Your Honor, I don't know that
25 that would satisfy --

1 THE COURT: Hold on one second. I may have
2 asked you this before. If I did, I apologize.

3 Does the government have any objection to my
4 modifying the sealing order to permit the consultation
5 with counsel for P.A. and, if they permit, with
6 P.A. ?

7 MR. FULLER: With counsel? If you consult
8 with -- I'm sorry?

9 THE COURT: No, no, I'm going to modify the
10 sealing orders, the sealing orders to permit -- I mean,
11 essentially what I have in mind is issuing a protective
12 order with regard to any discovery relating to this
13 where all of the people working on this case can have
14 the information, they can use it for the purpose of this
15 case, and no other, and I would clarify whether that
16 includes going out and interviewing witnesses. But I
17 want to see whether you have any concern about that?

18 MR. MERRITT: If they want to develop a
19 factual record, they don't have to be shown these
20 documents.

21 THE COURT: Well, no, he wants to go and talk
22 to him. Right now it's not just the documents that are
23 under seal, but the information in the documents that
24 are under seal. Well, let me finish, because I don't
25 want any confusion about this.

1 Part of the reason I have a concern about closing
2 the public proceedings is generally it's a public right
3 to know, cases like *Standard Financial Management*, a
4 civil case, and that's my case I was referring to. But
5 my general orientation is to try and make things public,
6 if they can properly be made public. But another reason
7 is, um, that if I put it under seal, I don't expect to
8 read the information in the newspaper. And if I don't
9 have confidence that it's going to remain confidential,
10 I'll just unseal it, so I don't have to spend my time
11 and energy doing a leak investigation. So, I mean,
12 that's part of it. So I just want everyone to
13 understand that it's not just the documents that are
14 under seal, it's the information that's impounded.

15 MR. FULLER: I think to facilitate the Court's
16 consideration of the motion, to the extent redacted
17 has to be contacted, that should be fine.

18 THE COURT: I think redacted is in there.

19 MR. FULLER: redacted is the current attorney
20 for --

21 MR. KILEY: Well, my view is if I wanted to
22 develop a factual record, I have to deal with his
23 present counsel, his former counsel, and perhaps

24 P.A.

25 THE COURT: Right. I mean, this is factual.

1 I mean, I assume there's going to be -- you know,
2 there's a possibility there's going to be an evidentiary
3 hearing, there's a possibility that P.A. is going
4 to testify in connection with this motion. But there
5 may be a factual dispute as to what occurred. And I
6 think Mr. Kiley has been telling me that redacted was
7 present for at least the meetings after the first one?

8 MR. KILEY: I think that's what's in this, the
9 interview with -- um, on the Federal investigation is
10 what I'm telling you, your Honor, not the Secretary of
11 State matter.

12 THE COURT: I'm sorry. Say that again?

13 MR. KILEY: What I want you to understand is
14 I'm representing to you that what I think the record
15 will show is that from the point in time of the Federal
16 investigation forward, or any knowledge with respect to
17 that, P.A. had counsel, it was first redacted
18 . I never met with him without redacted present
19 in that time period. As opposed to a year earlier, or
20 whatever it was, when he visited the Secretary of
21 State's Office.

22 THE COURT: All right. But I'm going to
23 issue -- I have to see what the discovery is, but I'm
24 going to issue some order that's going to permit all of
25 you to use the documents and information in connection

1 with the litigation. And this is a sensitive issue.
2 But is there anybody other than P.A. , redacted and
3 redacted you think you would need to share this
4 information with?

5 MR. KILEY: Not on this discrete issue, no.

6 THE COURT: I mean, on the motion to
7 disqualify.

8 MR. KILEY: Well, what they're suggesting is
9 is that there may be facts within it, this notion that
10 there might be a witness, a basis of prior inconsistent
11 statements. I don't know what the statements are that
12 were made --

13 THE COURT: Well, that's why I thought you had
14 asked me for all of the grand jury transcripts?

15 MR. KILEY: Well, I probably will.

16 THE COURT: Okay.

17 MR. FULLER: Our position will be that that
18 will be unnecessary and Mr. Kiley will oppose the
19 motion. Obviously the Court will have that information.

20 THE COURT: No, but I -- I mean, I would
21 perhaps review it in camera, but I don't understand the
22 implications of everything. In other words, this is
23 what I anticipated. I'm not sure you did. And this
24 isn't a ruling, but it's -- it's just kind of embedded
25 in the issue. You say -- you, the government, say that

1 Mr. Kiley should be disqualified because he may have
2 personal information about statements P.A. made
3 that are inconsistent with what he said to the grand
4 jury or were in an interview. But for Mr. Kiley, you
5 know, to take a position on whether he has personal
6 information about prior inconsistent statements, he's
7 going to argue to me, and I'm not suggesting to him
8 anything that --

9 MR. KILEY: You're not.

10 THE COURT: -- that he has to know what the
11 statements were. And if there's something important in
12 the grand jury that he thinks, you know, Mr. DiMasi
13 would need him to be a witness for, I would expect him
14 to get out of the case. If on the other hand he comes
15 in and argues, "I've read the whole grand jury
16 transcript and it's entirely consistent with what

17 P.A. called me," "told me," then, 1, he'll argue
18 "There's no need for Mr. DiMasi to call me as a witness,
19 and if the government wants to call me as a witness, you
20 ought to exclude that under Rule 403," because, you
21 know, he probably told other people this, too, like
22 redacted, or somebody.

23 MR. FULLER: Well, the Government's position
24 is that Mr. Kiley can assess that -- granted the entire
25 transcript is not incorporated in the indictment, but

1 the key allegations that are -- certainly the ones that
2 are incriminating, and there may be others, but to
3 Mr. DiMasi are there. Mr. Kiley can sit here today and
4 tell the Court or factfinder if that information was
5 consistent or inconsistent without seeing the
6 transcript. So given that there is a possibility he
7 could be a witness, then why run the risk of producing
8 the entire transcript especially when the Court would
9 have the opportunity to review it? I think Mr. Kiley
10 would end up probably being a witness in a motion -- in
11 this evidentiary hearing, should there be one. You
12 know, and that poses another thought, whether or not
13 there needs to be standby counsel to conduct that
14 hearing. You know, there's unfortunately a lot of
15 lawyers here.

16 But on the main point about the access to the
17 transcript, there's enough information in the indictment
18 about what P.A. said that I think Mr. Kiley would
19 be able to know whether or not it was consistent with
20 what the witness told him.

21 MR. KILEY: One other fact that I want to make
22 sure that we put on the record in this conference, which
23 is not reflected in the government's pleadings, is that
24 P.A. , at least through the Government, is not
25 seeking my disqualification or asserting any kind of

1 privilege or confidentiality. A very important
2 consideration, your Honor.

3 MR. WEINBERG: I think one other factor that
4 was raised by Mr. Goldstein --

5 THE COURT: Well, hold on just one second.
6 (Pause.)

7 THE COURT: I don't know that. In other
8 words, this is a motion under seal. I don't know what
9 P.A.'s position is in connection with that. And
10 I think the government probably knows this, but it's
11 just important to be sensitive to these things. It
12 wouldn't be proper for the government to, under the
13 ethical rules, to discourage P.A. from talking to
14 Mr. Kiley, if he wanted to -- and he's probably got a
15 lawyer and we would probably have to go through his
16 lawyer, I haven't looked at this, but, you know, the
17 witnesses are equally available to anybody and he can
18 talk to the government, if he wants, he can talk to the
19 defendant, if he wants. But there are cases that point
20 out the impropriety of the government instructing or
21 encouraging the witness not to talk to the defense. Go
22 ahead.

23 MR. KILEY: Just the -- I think the government
24 makes the representation, in Footnote 10 in their
25 original submission to you, with respect to the current

1 intentions, as they understand it, of P.A. I
2 have not made that --

3 THE COURT: What does it say his intentions
4 are?

5 MR. FULLER: Footnote 4, your Honor. I'm
6 sorry.

7 MR. KILEY: I think 1 is the original 4 now?

8 MR. FULLER: Page 4. "Counsel for P.A. has
9 advised that while P.A. believes" --

10 THE COURT: Not too fast. He's got to write
11 this down.

12 MR. FULLER: I forgot we had a reporter here.
13 "Counsel for P.A. has advised that while P.A.
14 believes he had an attorney-client relationship with
15 Attorneys Kiley and Cintolo, he does not seek
16 disqualification from this matter." That's in the
17 footnote.

18 THE COURT: Oh, okay. All right. Well, did
19 somebody else want to be heard on this?

20 MR. WEINBERG: Just briefly. We've worked
21 together towards trying to get common grounds for
22 discovery. We've worked with Mr. Fuller and we're
23 working on two different levels, one to try to agree to
24 a protective order that your Honor will consider fair.
25 Second, to receive electronic discovery, which we expect

1 in huge volumes, in a format that's user friendly and
2 searchable. And Mr. Fuller and I are working towards
3 that end.

4 But what interfaces with the disqualification
5 issue is I think all parties will tell you that this is
6 an enormous case in terms of the magnitude of the grand
7 jury, the magnitude of the expected documents, the
8 complexity. It's interfaced with state law where
9 Mr. Kiley is a preeminent authority of great value to
10 all members of this defense, small defense community.
11 He's not fungible. He's not replaceable, particularly
12 in a case where there's some hope for a speedy trial.
13 In contrast to some expectation, we're going to be
14 getting a huge electronic volume of discovery and I hope
15 your Honor considers his value not only to Mr. DiMasi,
16 but to the administration of justice in terms of a
17 speedy trial.

18 THE COURT: I don't know that that's a
19 cognizable consideration. But -- here, with regard to a
20 possible protective order, take a look at *Salemme*, 978
21 F. Supp. 386 at 390. This is the sort of format for a
22 protective order that I would probably enter. I was
23 thinking of doing it now. But how --

24 MR. MERRITT: May I ask a procedural question,
25 your Honor?

1 THE COURT: Yes.

2 MR. MERRITT: Is the Court rescinding the
3 order of reference? Is the Court going to be handling
4 discovery matters?

5 THE COURT: I may be. I probably will be,
6 unless you -- well, I'm going on vacation in July. I
7 think everybody knows that. Are you, too?

8 MR. MERRITT: Yeah.

9 THE COURT: Good. Make your plans for next
10 July, too, and maybe we'll try the case a year from
11 September, if not earlier, which would be great from my
12 perspective. I mean, I'm with Mr. Goldstein, you know,
13 I want this to go.

14 But, you know, I'm -- I probably will take the
15 case. And I haven't decided when, but -- well, that's
16 part of the reason I wanted to see you, because I
17 don't -- I don't want any appeals. It's a waste of time
18 to have things done twice. And I might as well, you
19 know, have a feel for all of this, about what you're
20 talking about, not to have somebody tell me, "Well,
21 we've discussed that with the Magistrate Judge." But,
22 you know -- that's probably what's coming.

23 So basically what do you propose as a way of
24 proceeding? Do you propose to litigate any discovery
25 issues? Do you want a modification of the impoundment

1 orders so you can do some investigation? When do you
2 propose to respond to the government's filings?

3 MR. KILEY: Um, I would anticipate first
4 seeking all of the grand jury -- if this issue of me as
5 a potential witness on an inconsistent statement is
6 real, I will press -- I will file a motion. If I may
7 have until -- is Monday too soon to get the grand jury?

8 THE COURT: And you can say, "No," but next
9 Tuesday is my last day in the office until August. So
10 what do you want to do?

11 MR. KILEY: Just for the transcript, I want to
12 get --

13 MR. CINTOLO: If it's just for the
14 transcript. We've got a brief in the Ninth Circuit to
15 do.

16 MR. KILEY: I do know that.

17 THE COURT: Well, we might as well talk about
18 this. If you want to file something, you should file it
19 simultaneously maybe while I'm on vacation. But the
20 point is that I think the government is not going to
21 agree to give you the transcript. At least they didn't
22 come in here intending to give them to you and normally
23 there are good reasons for not wanting to give them. On
24 the other hand, you need to understand that Mr. -- well,
25 that Mr. Kiley is going to argue, "How can we make a

1 properly-informed decision as to whether I have any
2 information inconsistent with what P.A. told the
3 government if I don't see everything he told the
4 government?"

5 MR. GOLDSTEIN: Could I have one more point,
6 your Honor?

7 THE COURT: Well, in -- then, you know, and
8 then you'll explain to me, as you began to explain it to
9 me, why he doesn't need it for these purposes or why I
10 should look at it. The problem is that I don't know the
11 case except for essentially what I read in the
12 indictment and what you told me, and I don't know what

13 P.A. told Mr. Kiley. He's the one who would know
14 whether it's inconsistent or not. If they got it, it
15 would be subject to some kind of protective order
16 similar to what you'll see in *Salemme*, which limits the
17 use.

18 MR. KILEY: My first step would be that. I
19 would envision that within two weeks after securing the
20 transcripts, I would -- and I'm assuming that I'm going
21 to be able to communicate with redacted
22 and, if permissible, P.A. , if permitted by
23 redacted , to develop the factual record and do a
24 submission again two weeks after I get the grand jury.

25 THE COURT: All right. And I assume the

1 government would want some time to respond to that?

2 MR. FULLER: Yes, your Honor.

3 THE COURT: Is there any hope that you could
4 agree on the discovery, I mean, if you talk further sort
5 of reflecting on this discussion?

6 MR. FULLER: On the transcript?

7 THE COURT: Yes.

8 MR. FULLER: I don't think so.

9 MR. MERRITT: I mean, granted Mr. Kiley wants
10 to proffer to us what P.A. told him and then we
11 can go in that direction.

12 MR. KILEY: I'm not in a position to do that.

13 THE COURT: Okay. Well, it sounds like -- so
14 when do you propose to make your motion?

15 MR. KILEY: I proposed Monday until Bill
16 kicked me under the table --

17 MR. CINTOLO: Wednesday? Next Wednesday?

18 THE COURT: Okay. This may not be great from
19 Mr. Goldstein's perspective, but it obviously is not
20 going to get resolved before I go away. So next
21 Wednesday?

22 MR. CINTOLO: Still in June?

23 THE COURT: I'm not going to leave -- next
24 Tuesday is my last day in the courthouse until August,
25 which is why I gave you Friday.

1 MR. CINTOLO: Well then, Monday. I'll do it
2 Monday. That's okay.

3 THE COURT: No, no, I've got plenty to do.
4 I'm going to be doing the *Sampson* death penalty habeas
5 on Monday. I'm not going to be sitting there waiting
6 for your motion. Because the government is going to
7 have to have time to respond to it anyway. You want to
8 read their motion and respond to it.

9 About how much time do you think you want to
10 respond to it?

11 MR. FULLER: Two weeks is customary.

12 THE COURT: All right. Can I have Dennis's
13 calendar, please.

14 MR. FULLER: Oh, on the transcript?

15 MR. KILEY: This is just on the transcript.

16 MR. FULLER: Oh, probably -- I hate to cut my
17 own time, but that says a week, so --

18 THE COURT: Well, he's going on vacation, so a
19 week is fine with him.

20 MR. FULLER: Okay, two weeks. Sorry, your
21 Honor.

22 THE COURT: All right. The defendant's motion
23 for discovery, because you may be talking about more
24 than the transcript. Well, first of all, I'm going to
25 order that you confer on this before you file. You've

1 got to let some of this sink in a bit and maybe you can
2 reach some resolution. Look at my protective order.
3 Look at the -- you know, what they're requesting.

4 Is it just the grand jury transcript or is it
5 going to be more than the grand jury transcript?

6 MR. KILEY: We ask for the statements, the
7 3500 material, but it's just -- it's limited to P.A. .

8 THE COURT: All right. So defendants are
9 going to file that motion on Wednesday -- if I'm going
10 to give them two weeks, Mr. Cintolo, do you want a
11 little more time? Do you want till the end of next
12 week?

13 MR. CINTOLO: That would be fine.

14 THE COURT: Here, I'm going to give you until
15 the 29th. And I'm ordering that you confer before you
16 file anything, because, you know, the government never
17 wants to give this up a year in advance. But as soon as
18 I read the motion, I knew that this was going to be the
19 issue. Because, at a minimum, the issue of Mr. Kiley as
20 a witness relates to -- there may be another way to deal
21 with it, but it relates to what did P.A. say?
22 Because there's a -- well, you know, if the government
23 -- you know, you may be able to evade it, if you want to
24 do this, but then it concerns me, if not full
25 disclosure, because then Mr. DiMasi has to know what

1 kind of risk he's assuming. But if you say, you know,
2 "We're concerned only that Mr. Kiley would be a witness
3 on A, B, C, and D and, you know, we've given him A, B,
4 C, and D," but that might not cut through it because --

5 MR. FULLER: I would probably think Mr. Kiley
6 is going to want all of it. So we'll confer, your
7 Honor, absolutely.

8 THE COURT: Yeah, reflect on it. Because it
9 really is just inherent in the issue the way you posed
10 it and it strikes me as the right way to pose it.
11 That's one of the issues, is he a necessary witness?

12 MR. FULLER: Well, that isn't the only issue.
13 I don't want to suggest that --

14 THE COURT: Yeah, I say it's one of the
15 issues.

16 MR. FULLER: Yes.

17 THE COURT: And it might be the dispositive
18 issue. So --

19 MR. CINTOLO: That's under seal, correct, your
20 Honor, to file it under seal?

21 THE COURT: Yeah, I'll give you an order
22 because -- well, every time you file something under
23 seal, also under seal is -- well, we're going to come
24 back to this, as to whether I'm going to open all of
25 this. You've got to file -- and I'll tell you, in my

1 order, either publicly or also under seal, a redacted
2 copy, so when all of this -- this is all going to get
3 unsealed, at this point, but probably with redactions,
4 which you all will have to make carefully, including to
5 this transcript. But I'll give you something in writing
6 on how to file.

7 All right. And so if that's filed on June 29th,
8 Mr. Fuller wants two weeks to respond on discovery, so
9 that would take us to the 13th. But you've got the 4th
10 of July in there. Do you want until the 15th?

11 MR. FULLER: (Silence.)

12 THE COURT: To respond to discovery?

13 MR. FULLER: That's fine, your Honor.

14 THE COURT: You can do it sooner, if you want,
15 but you wanted the two weeks. I want you to get a
16 little vacation, too.

17 MR. FULLER: I have a trial starting the 13th,
18 so that's not going to matter to me.

19 THE COURT: All right. So do you want me to
20 give you the 10th?

21 (Laughter.)

22 MR. FULLER: The 15th is fine, your Honor.

23 THE COURT: Okay, the 15th. If there's any
24 reply that's going to be filed, it will be the 22nd.
25 I'll get this and perhaps decide it before I come back.

1 But once I determine what the discovery is, I'm going to
2 give Mr. Kiley two weeks after that to file his
3 opposition and then I'll give the government one week to
4 reply, and I expect I'll schedule a hearing, which I
5 would aim to conduct in August.

6 MR. CINTOLO: In the interim -- I know you're
7 going to address this, but will we be allowed to contact
8 redacted ?

9 THE COURT: Yes, I think with some
10 restrictions. Well, the short answer is "Yes," you're
11 going to have to get a written order. But the -- but if
12 the government doesn't object to it. But I think it's
13 probably necessary.

14 MR. DRECHSLER: Your Honor, I do plan on
15 taking some time off in August.

16 THE COURT: I was just going to ask you that.
17 When will that be?

18 MR. DRECHSLER: Well, I haven't finally
19 determined that. But I would say this, I was going to
20 ask, anyway, that if a hearing is conducted solely on
21 the issue of disqualification, I'm privately retained,
22 my client and I are trying to conserve resources, and so
23 if the hearing is solely going to be on that issue,
24 whether evidentiary or nonevidentiary, that I be excused
25 from that day and I wouldn't interfere with the Court's

1 schedule on that.

2 THE COURT: Any time I schedule a hearing, if
3 it's on an issue that doesn't involve one of your
4 clients and you prefer not to be there, you can just
5 file something and say that you've consulted your client
6 and, you know, he and you request that you be excused.

7 MR. DRECHSLER: I haven't determined yet, but
8 I'm going to be taking a couple of weeks off in August,
9 but not consecutively, probably the 3rd and then the
10 last week before Labor Day. But I haven't confirmed
11 that.

12 THE COURT: Well, until I get the briefing,
13 you know, it's conceivable that we'll be doing that
14 right after Labor Day, hopefully before.

15 Now, I think I have two options, at this point,
16 with regard to opening these proceedings. I want to
17 read what the government filed more closely, but now the
18 government is advocating that this be open and the
19 documents be unsealed. Is that correct?

20 MR. MERRITT: Yes, your Honor.

21 THE COURT: And do the defendants still oppose
22 that?

23 MR. KILEY: Well, I never thought it was our
24 motion, I thought it was the Government's, and I -- your
25 Honor, my view is that the wisest course, because there

1 are allegations that may not pan out with respect to
2 privilege, that the wisest course is to keep sealed,
3 until you're ready to make findings with respect to
4 privilege, when you are ready to make those findings, I
5 heard the Court loud and clear that at some point this
6 matter is going to be public.

7 THE COURT: It is, and I really want it to be
8 public when, after hearing you, I decide it's going to
9 be public and not read it in the newspaper, but you've
10 been really good on that so far. You know, you share
11 this interest.

12 My inclination is not to unseal anything now, um,
13 but to revisit this when I have the defendant's response
14 and maybe the government's reply on the merits, to
15 basically revisit this in August. You should order the
16 transcript and the parties should review it and make any
17 necessary redactions. If you want P.A.'s name
18 out, you'll have to give me a redacted copy.

19 I'm willing to -- you know, because if this -- if
20 I order disclosure of the grand jury transcripts, which
21 is probably the next issue I'm going to have to decide,
22 you know, the government might have a different view on
23 how much of this ought to be public. It seems to be a
24 very fluid situation.

25 But does the government want to be heard further

1 on that?

2 MR. MERRITT: Well, your Honor, I'm sort of
3 handling the --

4 THE COURT: Well, that's fine.

5 MR. MERRITT: I don't think -- well, our
6 position is, at this point, that the Court has enough
7 for it to make the determination that there aren't
8 countervailing considerations that have been proffered
9 by the defendants that would rebut the presumption of
10 openness. Both parties agree essentially, although no
11 one has come out directly and said it, but that if there
12 was an attorney-client privilege, it has been waived by

13 P.A. in talking to the government. So that is
14 just kind of a specter of attorney-client privilege. I
15 don't think that's a real issue for the Court to find
16 that there's a reason to keep this in these closed
17 proceedings. And, well, the Court can read our thing,
18 but this is the kind of proceeding that is and should be
19 open to the public.

20 THE COURT: I know, that's what I told you
21 initially.

22 MR. MERRITT: Well, we agree with the Court,
23 but --

24 THE COURT: No, I --

25 MR. WEINBERG: I think there will be a

1 countervailing factor that probably isn't yet directly
2 on the table. As I go back to the *Flemmi* case, I quite
3 frankly can't remember, because I did some of the
4 representation with Mr. Egbert, whether we filed a brief
5 that was based on *U.S. vs. Cunningham*, the Second
6 Circuit case of 472 Fd. 2nd or not? And I know one of
7 the key variables will be, for Mr. Kiley, to disclose to
8 the Court the full extent of his prior relationship with
9 Mr. DiMasi and the extent to which counsel of choice and
10 his replaceability or irreplaceability is at stake. And
11 therefore there will be, I think, matters Mr. Kiley will
12 want to present to the Court about the historic
13 attorney-client privilege that he would not want to be
14 disclosed to the public.

15 THE COURT: But that's not inconsistent with
16 unsealing the documents that exist to date. People --
17 you know, the public would know that there's an issue
18 that the government is seeking to disqualify
19 Mr. DiMasi's attorney, but you could file a motion to
20 submit something particular under seal. The question is
21 whether the whole thing is secret, which is what I felt
22 uncomfortable with to begin with.

23 Well, I'm going to do the following, because you
24 need to get to work on this. I ordered the Government
25 to file redacted versions of this submission, which it's

1 going to correct by Friday. But all parties should file
2 redacted versions of their submissions in case I decide
3 to unseal something before I go. I'm ordering that you
4 order the transcript, which may take a while to prepare
5 because we're doing a lot of things, and you're going to
6 have to review this transcript and propose redactions.
7 I'll put it in an order and I'll give you one week to
8 propose redactions.

9 The government and the defendant, you should
10 confer. Whoever is serving as -- if I decide to unseal
11 this, um, before I go, I'll ask whoever is working as my
12 Deputy Clerk in the matter to give you a heads-up. I
13 mean, you'll get the order or I'll issue the order and
14 the redacted versions will be put on the public record
15 the next day or something like that.

16 But the basic principle is that there's a
17 presumption of public access, that's in part to hold the
18 prosecutor -- you know, so the public can hold the
19 prosecutors accountable and so that the public can hold
20 me accountable as the judge. And in this case, you
21 know, we're not talking about unlitigated Title IIIs,
22 there's not a question of whether, you know, if you had
23 a wiretap, and two people were discussing killing
24 somebody and there was a question about whether that was
25 going to be excluded, in evidence, whether it was going

1 to be suppressed, that could be unfairly prejudicial if
2 it was publicized and never got into evidence. But it
3 sounds to me like what's in the government's submission,
4 you know, is going to be P.A. -- or, you know,
5 some statements by P.A. based on his personal
6 knowledge, if they're relevant then they would come into
7 evidence. So there's not that kind of risk of unfair
8 prejudice that we would be dealing with if we were
9 dealing with an unlitigated Title III.

10 And I think it's your position, Mr. Kiley, that
11 this was never intended to be confidential for
12 Mr. DiMasi and it was never -- and, you know, and it
13 wouldn't be improper for you to make it public in cross-
14 examining P.A.

15 MR. KILEY: That's right. The government's
16 motion to disqualify me is predicated in part on the
17 notion that I possess confidential or privileged
18 information. I don't believe I do. But if I do -- but
19 if I do, then information pertaining to these
20 proceedings, under *Sidel*, is precisely the kind of thing
21 that can override the presumption for that, but just for
22 that.

23 MR. WEINBERG: Could I just raise one other
24 issue to support that? The courtroom was packed with
25 media today. If your Honor was to unseal this prior to,

1 rather than after making the decision to hopefully
2 retain Mr. Kiley as counsel, there's going to be far
3 more predictable publicity and publicity that may
4 somewhere, in some juror's mind, have the potential for
5 discrediting all defense counsel. The government is
6 moving on ethical and legal grounds to disqualify one of
7 us. If, again, the publicity was unsealed, there would
8 be no prejudice to the media, they can integrate it with
9 your Honor's ultimate decision --

10 THE COURT: All right. Here's what I've got
11 to do to be fair. Here goes my vacation again. You've
12 got to have a chance to respond to what the government
13 just filed. I mean, I'm the one who raised the issue.
14 I think -- I'm uncomfortable with doing all of this
15 secretly. I mean, I had eight hearings that were closed
16 when we were talking about whether I would order the FBI
17 to disclose if Whitey Bulger and Stevie Flemmi were
18 informants, because if that information got out,
19 somebody could get killed. And if I wasn't going to
20 order it, I mean -- I mean, that that's what was at the
21 heart of the case. But this isn't the same situation.
22 I don't think they cited my June 6th *Salemme* decision
23 where I discussed some of this, including *Amadeo*, which
24 I noticed was in your papers.

25 But I don't, at the moment, see waiting until the

1 end to do a decision on this motion and then unsealing
2 it. I think I'm likely to unseal it before then.
3 Having said that, I do think there are legitimate
4 competing interests. I'd like to be somewhat surgical
5 in deciding what gets unsealed. There are things that I
6 think that the government is not going to want out. If
7 I order the grand jury transcripts be disclosed, I don't
8 think the defendants should just be able to just dump
9 them all on the public record. And I'll have a
10 protective order. And I don't think they would do
11 that.

12 But, Mr. Weinberg, do you want an opportunity to
13 respond to what the government filed yesterday?

14 MR. WEINBERG: Yes, your Honor.

15 THE COURT: Why don't you take until a week
16 from Monday.

17 MR. WEINBERG: Thank you, sir.

18 THE COURT: It's a little less than the
19 traditional 14 days, but the 14 days probably falls on
20 the 4th of July.

21 MR. KILEY: If you had asked me, I would have
22 been saying, yes, your Honor, too.

23 THE COURT: Well, you want it, too? Yeah, you
24 all can.

25 MR. KILEY: Of course. Of course.

1 THE COURT: But, you know, I'm the one who
2 raised the question. You know, now the government's
3 come around to my perspective, which I think is
4 consistent with the instructions they generally have
5 from the Attorney General that you're supposed to have
6 open proceedings. But, you know -- and again, this is
7 another thing you all should be talking about. I mean,
8 maybe you -- I mean, you can always move to file things
9 under seal and I'm likely to let you file them under
10 seal, at least temporarily, until I can read them and
11 hear if there's a dispute and consider the public
12 interest, same as I did with the original motion.

13 So I suppose there's -- you know, there's reason
14 to be careful. Arguably attorney-client relationships
15 are involved. But, you know, I'm disinclined to keep
16 all of this out of public view until it's resolved.
17 And, you know, if you talk to each other and you can
18 suggest some parameters that you agree on, I may agree,
19 too. Or I may not, since initially you all agreed that
20 they should all be closed and then I didn't have the
21 concern.

22 (Pause.)

23 THE COURT: All right. Hopefully you've been
24 taking notes. I'll get you a written order. I'll
25 probably get you two written orders, one that relates to

1 what happened in open court and one that relates to
2 what's happening here. But I'm not quite sure when
3 you'll get the written order as to what occurred here.
4 So keep your notes.

5 (Pause.)

6 THE COURT: I had a couple of other
7 questions.

8 Okay. All of this discussion has been about
9 Mr. Kiley meeting with P.A. . Is there a possible
10 disqualification concerning Mr. Cintolo flowing from the
11 fact that they're partners?

12 MR. FULLER: We're not sure. Again, it would
13 be the knowledge of the attorney whether or not he met
14 with Mr. Cintolo is --

15 THE COURT: Well, I'll help you out.

16 Have you had any of the meetings with

17 P.A. ?

18 MR. CINTOLO: Yes.

19 THE COURT: How many?

20 MR. CINTOLO: Two. The ones with redacted.

21 MR. FULLER: And we know he is a partner.

22 THE COURT: Oh, I know. But you just found --

23 MR. FULLER: Yes, we suspected as much, but
24 thank you, your Honor.

25 THE COURT: Well, you should ask him. He

1 might have even told you.

2 MR. WEINBERG: Yes. May Mr. Vitale be excused
3 to go to the men's room?

4 THE COURT: Yes. There's actually one right
5 back there. But we're almost finished.

6 (Mr. Vitale leaves.)

7 THE COURT: All right. And, Mr. DiMasi, at
8 some point, um, I'm going to ask you a series of
9 questions as to whether you understand all of this and
10 you understand the arguments, the arguable risks to
11 you. As I said earlier, I'm not ordering you to go to
12 yet another lawyer to get independent advice, but I'll
13 probably ask you whether you did, because my
14 responsibility, you know, is to the fairness of the
15 proceedings and to be sure that, you know, you're
16 comfortable, that you're being effectively and
17 energetically represented by somebody who has no
18 competing interest, not by somebody who says, you know,
19 "I could be a witness, but I'm a lawyer, so I won't be a
20 witness, even though I could help as a witness type of
21 thing." So I want to encourage you to think all of
22 these things through.

23 I'm not saying don't talk to Mr. Kiley and
24 Mr. Cintolo about it, but it may be in your interest to
25 talk to somebody else about it. I may well ask you

1 that. But, you know, once I ask you, unless something
2 unforeseen comes up, as far as I'm concerned, you're
3 going to have to live with the answer.

4 So, you know, sometimes we see this. You know,
5 somebody is happy with their lawyer and then they get
6 convicted and they say, "I wasn't effectively
7 represented." I would like to do this one time and in a
8 way that's fair to everybody and the decisions are made
9 on an informed basis and there's no reason to reopen
10 it. All right?

11 Is there anything else we ought to discuss?

12 Okay. Rest up.

13 MR. WEINBERG: Thank you, your Honor.

14 MR. KILEY: Thank you, your Honor.

15 (Ends, 1:15 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes,
before Chief Judge Mark L. Wolf, on Wednesday, June 17,
2009, to the best of my skill and ability.


RICHARD H. ROMANOW